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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-340

WESTERN SHOSHONE IDENTIFIABLE GROUP,
REPRESENTED BY THE TE-MOAK BANDS
OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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No.

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Western Shoshone Indians respectfully pray that a writ of certiorari issue to review the judgement of the United States Court of Claims, entered on June 1, 1979, which refuses to stay these proceedings to permit a determination of the Indians' claim that they still own some lands embraced by the judgment.

OPINIONS BELOW

The opinion of the Court of Claims, reported at 593 F.2d 994 (1979), is reprinted as Appendix A hereto. The

order denying the Western Shoshone motion for rehearing on June 1, 1979 is reprinted as Appendix B. The final award of the Indian Claims Commission, reported at 40 Ind. Cl. Comm. 453 (1977), is reprinted as Appendix C.

The Commissiom issued several opinions in this case. The Commission's order denying a stay, reported at 40 Ind. Cl. Comm. 305, is reprinted as Appendix D. Relevant excerpts from the Commission's earlier opinion determining the liability of the United States, reported at 11 Ind. Cl. Comm. 387 (1962), are reprinted as Appendix E.

JURISDICTION

The Court of Claims denied the Western Shoshone motion for rehearing on June 1, 1979. This Court has jurisdiction under 25 U.S.C. 70s(c) and 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether an Indian tribe should be denied the opportunity to have its claim to beneficial ownership of lands decided, and forced under the Indian Claims Commission Act to take a money award as compensation for lands it may still own, where its claim of title has never been determined on the merits and payment of the money will bar subsequent adjudication of the title claim?

STATUTES INVOLVED

The Ruby Valley Treaty of October 1, 1863, 18 Stat. 689, is reprinted as Appendix F.

Section 22 of the Indian Claims Commission Act of August 13, 1946, 25 U.S.C. 70u, is set out as Appendix G.

STATEMENT

A. *Proceedings before the Indian Claims Commission*

In 1951 the Western Shoshone, represented by the Te-Moak Bands of Western Shoshone Indians,[1] filed a petition before the Indian Claims Commission to recover money damages from the United States for various historic wrongs, including generally the taking of lands aboriginally owned by the Western Shoshone. The Western Shoshone were then represented by counsel pursuant to a contingent fee contract with the Te-Moak Bands setting counsel's compensation as a percentage of money damages awarded.

The Commission held a hearing to determine liability in 1957. Counsel representing the Western Shoshone presented evidence that they aboriginally owned millions of acres in Nevada, California and Utah. No evidence was introduced on how, if at all, ownership to these lands had been extinguished. Counsel for the Indians simply stated:

> "[I]n connection with the question of the taking of the land involved in this case, we have not gone into the detailed step-by-step process of the taking because I think as a matter of law that is well established." [Transcript of Hearing, August 29, 1957, p. 276].

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[1] There is no single present day band or tribe of Western Shoshone Indians. The Te-Moak Bands, one of the federally recognized bands of Western Shoshone, is organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, and has been determined to be the "exclusive representative" of the Western Shoshone under Section 10 of the Indian Claims Commission Act, 25 U.S.C. 70i. *Western Shoshone Legal Defense & Educ. Ass'n. v. United States*, 209 Ct. Cl. 43, 48-49, 52-53, 58-59, 531 F.2d 495, 497, 499, 503-504, cert. denied 429 U.S. 885 (1976); see also 11 Ind. Cl. comm. 387, 388, 445-446 (1962).

The United States, as defendant, also did not present any evidence establishing taking. The Government's sole defense was that the Western Shoshone had not aboriginally owned the lands.

The Indian Claims Commission ruled against the Government on the ownership question, holding that the Indians had aboriginally owned over 24 million acres (11 Ind. Cl. Comm. 387, 413-414 (1962) (Appendix E)). On the question of title extinction, the Commission simply stated that

> "by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands." 11 Ind. Cl. Comm. at 416.

In 1972 the Commission valued the lands[2] as of July 1, 1872—a supposed "date of taking"[3] stipulated to by counsel.

B. *Western Shoshone motion for a stay*

On November 14, 1976, the Western Shoshone moved the Commission to stay all proceedings.[4] At the same

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[2] The Commission's opinion and findings as to valuation are reported at 29 Ind. Cl. Comm. 5 (1972). No issue concerning valuation is raised by this Petition.

[3] Under the Indian Claims Commission Act, lands are valued as of the date of taking. Interest is not paid where title has not been "recognized." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). This historic value, of course, is generally much below present value of the lands.

[4] Prior to 1976, the Commission had rejected an attempt by a private, voluntary assocation of Western Shoshone to intervene

[footnote continued]

time, they discharged their contingent fee claims counsel. The Western Shoshone sought this stay because they believe that the United States still holds in trust for them several million acres of "public" and forest lands in northeastern and central Nevada which would be embraced by the judgment.

The only treaty between the Western Shoshone and the United States, the 1863 Treaty of Ruby Valley (18 Stat. 689),[5] defines (in Article 5) the "country" of the Western Shoshone by a metes and bounds description which covers over 15 million acres in Nevada. The Treaty extinguished Western Shoshone title outside the country so described. It also authorized the United States to pass to third parties title to lands *within* Western Shoshone country used for a broad variety of private purposes including mines, mining and agricultural settlements, ranches, and mills.[6] Under the Treaty, Western Shoshone title was to be extinguished to those privately owned lands, and also to lands used for certain other purposes, such as routes of travel, military posts, station houses,[7] telegraph and stage lines and a railway.[8]

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in the case, withdraw lands from the claim, stay all proceedings, and wrest control of the case from the Te-Moak Bands, 35 Ind. Cl. Comm. 457 (1975). The Court of Claims affirmed, *Western Shoshone Legal Defense & Educ. Ass'n. v. United States*, 209 Ct. Cl. 43, 531 F.2d 495, cert. denied, 429 U.S. 885 (1976). The court stated that the Te-Moak Bands were the exclusive representative of the Western Shoshone in this case, and that decisions such as seeking a stay and a determination of title are "precisely the kind of litigation strategy the statute [the Indian Claims Commission Act] leaves to the organized representative." 209 Ct. Cl. at 59, 531 F.2d at 503.

[5] This Treaty is reprinted as Appendix F.

[6] Treaty, Article 4.

[7] *Id.*, Article 2.

[8] *Id.*, Article 3.

The Treaty provided for reservations to be made "within the country***described" and that all Western Shoshone title would be extinguished outside these reservations. But this was never done.[9]

Title to the majority of lands within the country described in the Ruby Valley Treaty has never passed into private ownership. Most lands within the treaty area are today administered by the United States as "public" and national forest lands. The Western Shoshone claim beneficial title to these lands except for the few acres of publicly owned lands which have been used for purposes authorized in the treaty. Most Western Shoshone have never left their original country.[10] If judgment becomes final before the title question is resolved, Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70u,[11] could bar the Western Shoshone from asserting title to these lands. For these reasons, they asked the Commission to stay all proceedings until their title could be determined.

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[9] The Duck Valley Reservation, established in 1877 for Shoshones and Paiutes, is outside the area defined by Article 5 of the Treaty, and most Western Shoshone did not remove to it. *United States v. Dann*, 572 F.2d 222, 224 (C.A. 9, 1978); see *Western Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 318, 322-324 (1977).

[10] Within this area, some Western Shoshone live on very small areas of trust land purchased in the 1930s and 1940s pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq; Compare United States v. John*, 437 U.S. 634 (1978). Others live and have lived throughout the surrounding countryside, as squatters on the "public lands," or in the towns (see generally, 40 Ind. Cl. Comm. 318, 322-329 (1977)).

[11] That section is reprinted in full as Appendix G.

On August 15, 1977, the Commission denied the Western Shoshone motion for a stay and entered final judgment. 40 Ind. Cl. Comm. 318 (1977).[12] The Western Shoshone appealed the judgment to the Court of Claims because the Commission denied the stay.[13]

C. *Western Shoshone petition to the President and Secretary of the Interior*

In February, 1977, shortly after they moved to stay the proceedings in the Commission, the Western Shoshone petitioned the President and the Secretary of the Interior to determine their title to national forest and public domain lands within their treaty country. The Te-Moak Bands also hired present counsel to represent the Western Shoshone in this proceeding and before the Executive.[14]

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[12] At the same time, the Commission determined offsets allowable to the Government under the Indian Claims Commission Act. No issue concerning offsets is presented by this Petition.

[13] The United States cross-appealed from the portion of the judgment awarding the Western Shoshone damages for the value of minerals removed prior to the supposed 1872 "date of taking." The Court of Claims affirmed the Commission's award (593 F.2d 999-1002, Appendix A, pp. 8-14), and this issue is not raised by this Petition.

[14] Present counsel's attorneys contract, which has been approved by the Secretary of the Interior under 25 U.S.C. 81, *et seq.*, disclaims any share in the contingent fees to be awarded in this case and provides compensation on a straight hourly rate.

The Western Shoshones' contingent fee counsel contest the legality of their dismissal, and participated in the proceedings before the court below, resisting the Government's cross-appeal. The court found it unnecessary to decide any question concerning the rights of claims counsel vis-a-vis present counsel (593 F.2d at 997, App. A, pp. 4-5) and this question is not presented by this Petition.

The Secretary of the Interior initially declined to consider the Western Shoshone petition unless a stay were first obtained. While the appeal was pending before the Court of Claims, but after oral argument, the Interior Department changed its position. The Department advised the Western Shoshone that it would attempt to resolve "the issues presented in the Western Shoshone petition and***pending litigation" by investigating "the conditions of the Western Shoshone" and considering the creation of additional reservations. (Letter of January 30, 1979, reprinted as Appendix H). Thereafter, the United States joined the Western Shoshone in moving the Court of Claims to stay proceedings for a three month period.

D. *Court of Claims disposition of the appeal*

Notwithstanding the joint motion of both parties, the Court of Claims affirmed denial of the stay on February 21, 1979. Although the court acknowledged that there had been no "formal extinguishment of Indians' legal title," and thus no "taking" of some of their lands (593 F.2d at 996, App. A, p. 3), it held that the filing of the Western Shoshone petition before the Commission had carried an "implied obligation of the claimant***to state his claim and stick to his statement." (Id. at 998, App. A, p. 6). The court held that the Western Shoshone could have their title claim determined only by first "abandon[ing] ***(the claims) proceeding in its entirety." (Id. at 997, App. A, p. 5) The court held that a "partial" abandonment of the petition, "contingent" on a determination of title first, was precluded by the purposes of the Indian Claims Commission Act. (*Id.* at 998, App. A, p. 6).

The Western Shoshone moved the Court of Claims for rehearing, in part supported by the United States. On April 3, 1979, that court ordered a limited stay of proceedings until May 15, 1979. (This order is reprinted as Appendix I). The court made it clear, however, that "the stay will not be extended after May 15, 1979." Negotiations between the United States and the Western Shoshone to resolve both the land claim presented by the petition to the Secretary and this case could not be concluded in this period. The court then denied the motion for rehearing (App. B). Afterwards, the Secretary of the Interior informed the Western Shoshone that the Department would no longer attempt "to undertake a program for establishing additional reservation lands" or "take any further initiative to settle the litigation." (The Secretary's letter of June 27, 1979 is reprinted as Appendix J).

On August 27, 1979, the Te-Moak Bands filed suit against the Secretaries of the Interior and Agriculture and the United States in the United States District Court for the District of Columbia to determine that the Western Shoshone beneficially own the public and forest lands within the courntry described by the Ruby Valley Treaty (Civ. No. 79-2279).

REASONS FOR GRANTING THE WRIT

1. *The decision below works a grievous injustice because it forces Indians to take money damages for lands they still may beneficially own without ever having the merits of their title claim determined.*

Western Shoshone title to much of their traditional homeland is at stake in this appeal. The decision below prematurely forecloses the Western Shoshone from

having title determined and restored. It makes the United States pay for lands which it may not actually have taken, and would forever exclude the Western Shoshone from lands they may beneficially own. It is fundamentally unfair to force an Indian tribe to take dollars for lands it still owns and which are worth far more than the "damages" awarded—expressed in nineteenth century values—and fundamentally unjust to deprive an Indian tribe of its lands without ever having a determination on the merits of its claim to ownership.

The Western Shoshone have asserted a soundly based claim to continued land ownership.[15] Their traditional

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[15] Although the merits of the Western Shoshone claim to land ownership are not presented by this Petition and were not before the court below since it has no jurisdiction to quiet title, the claim is soldily grounded in controlling decisions of this Court. Ever since the early case of *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823), this Court has confirmed that Indian tribes hold ownership to lands they traditionally used and occupied before the coming of European settlement. Congress and only Congress can extinguish that title. E.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-669 (1974); *United States v. Santa Fe Pac. R.*, 314 U.S. 339 (1941). See generally Cohen, Original Indian Title, 32 Minn. L.Rev. 28 (1947); *Note, Indian Title: The Rights of American Natives to Lands They Have Occupied Since Time Immemorial*, 75 Colum. L.Rev. 655 (1975); *Note, American Indian Land Claims: Land Versus Money as a Remedy*, 25 U. of Fla. L.Rev. 308 (1973).

Even affirmative grants of Indian lands by Congress absent express indication of extinguishment, "convey a title to the grantees, subject***to the Indian right of occupancy." *Johnson v. McIntosh, supra* at 574; *Buttz v. Northern Pacific R.*, 119 U.S. 55 (1886); *Beecher v. Wetherby*, 95 U.S. 517 (1877); *Holden v. Joy*, 84 U.S. (17 Wall) 211 (1872). Similarly, decisions of this Court establish that administratively treating Indian lands as public domain or opening them to entry and settlement does not extinguish Indian title. E.g., *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); See also *Cramer v. United States*, 216 U.S. 219 (1923). *A fortiori*, physical intrusion by non-Indians that is not connected with a clear and plain congressional purpose to close out Indian title cannot work an extinguishment.

homelands are uniquely valuable, worth far more than money. Money once spent is gone. Tribal lands, protected from alienation by federal law,[16] can last forever to sustain the government and culture of the Western Shoshone. More is at stake in this appeal than land alone. This appeal involves a heritage, a way of life, a chance—perhaps their last—for the Western Shoshone to maintain themselves as a distinct community.

All the Western Shoshone seek is that the title to disputed lands should be validly determined before payment is made on the unexamined assumption, never litigated, that title has been lost. This should be done before money is paid, not frustrated by artifice or technicality.

2. *The decision below bars Indian tribes from asserting title to any lands covered by a petition pending under the Indian Claims Commission Act unless the tribe abandons the entire claim.*

The court below holds that—to assert a claim to ownership of *any* lands embraced by a petition filed before the Commission—a tribe must "abandon [the claims] proceeding *in its entirety*." 593 F.2d at 997, App. A, p. 5 (emphasis supplied). Moreover, the court holds that dismissal with prejudice must occur *before* a title claim may be adjudicated; abandonment cannot be "partial and contingent," as by a stay until title has been decided. *Id.* at 998, App. A, p. 6.

The court's decision would foreclose any tribe with a pending petition under the Indian Claims Commission Act from securing a determination of its claims to land embraced by the petition. It imposes the "mischievous

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[16] E.g., 25 U.S.C. 177; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

doctrine"[17] of election of remedies on Indian litigants with unprecedented savagery. As long ago as 1918, this Court observed that this doctrine "for obvious reasons***has never been a favorite of equity." *Friederichsen v. Renard,* 247 U.S. 207, 211. More recent decisions of this Court reaffirm its disfavor for an absolutist view of election of remedies. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). *United States v. 93.970 Acres of Land,* 360 U.S. 328 (1959).[18]

Abandonment of the entire claims case would be especially unjust here. As the court below recognized (593 F.2d 997, App. A, p. 5), much Western Shoshone land—both outside the country described in the treaty and within it—was clearly taken, and most of the money award represents the value of mineral lands and minerals relinquished by the Ruby Valley Treaty. See 29 Ind. Cl. Comm. 5, 30, 42, 57 (1972). Complete abandonment of the claim would eliminate *any* compensation for these taken lands and minerals.

Even if the money award were exclusively for lands still claimed to be owned, it would be unreasonable to require—as the decision below does—abandoning a money damage remedy *before* title has been determined in a

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[17]2 Moore's Federal Practice, para, 2.06[3] at 361. See also 1B Moore's Federal Practice, para. 0.405[7]. This doctrine has long and generally been criticized by scholars. E.g., *Election of Remedies: A Delusion?,* 38 Colum. L. Rev. 292 (1938); Hines, *Election of Remedies: A Criticism,* 26 Harv. L.Rev. 707 (1913).

[18]This Court has assiduously avoided procedural technicalities which would prevent substantive justice to Indians. E.g., *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 470-474 (1976) (bar against enjoining state taxes); *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) (well pleaded complaint rule); *Squire v. Capoeman,* 351 U.S. 1 (1956) (narrow construction of tax exemptions).

proceeding binding on the United States. The "contingent" abandonment proposed by the Western Shoshone request for a stay is a responsible, straight-forward procedure. The Commission and Court of Claims have no jurisdiction to award them lands. But executive agencies have jurisdiction to decide whether lands they administer are public domain or are beneficially owned by Indians. Moreover, Congress has recently broadened the waiver of sovereign immunity to permit suits for declaratory and equitable relief[19] and to quiet title to lands[20] against the United States.

The Western Shoshone reasonably sought first a determination of their title in a forum empowered to grant them relief, while preserving their rights to recover money damages if their title claim is denied. They are not trying to have their cake and eat it too, but simply to keep the part of the cake that is uneaten and be paid for the part that is gone. The Secretary of the Interior's laudable undertaking to study the land needs of the Western Shoshone and resolve both the claims litigation and the title claim recognized the justice of this position but was aborted by the court's rejection of a stay.

3. *The decision below perverts the purpose of a landmark federal statute designed to benefit Indians.*

The Act of August 13, 1946 establishing an Indian Claims Commission was the culmination of more than ten years' effort by Indian tribes and their supporters to

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[19]The Act of October 21, 1976, 90 Stat. 2721, amends 5 U.S.C. 702 and 703 to permit actions for injunctive and declaratory relief against the United States and its officials without regard to sovereign immunity.

[20]Act of October 25, 1972, §3(a), 86 Stat. 1176, 28 U.S.C. 2409a.

redress historic wrongs. As Mr. Justice Black wrote a few months after the Indian Claims Commission Act was passed, concurring in *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 55 (1946):

> "[T]he pattern of congressional legislation***has become progressively more generous in its treatment of Indians. The capstone of this type of legislation was an Act passed by the last Congress, which established an Indian Claims Commission***.[21]

The court's holding that a stay "would have been contrary to the statutory procedure under which the suit was brought, [and] the intent and purpose of the Act ***" (593 F.2d at 998-999, App. A, p. 7) perverts the Indian Claims Commission Act by using it to force a present extinguishment of the title of Indian tribes to lands they own. This misreading of the Act simply cannot be justified in terms of its exemplary purposes. The decision below creates new injustices to Indians instead of righting old wrongs and imperils all Indian tribes with claims proceedings still pending.[22] This Court should grant the Writ to revive the "compassionate

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[21] The Act's "primary objective" was to remove a "lingering discrimination" which had prior to 1946 prevented Indian tribes from filing claims against the United States. H.Rep. No. 1466, 79th Cong., 1st Sess. (1945) p. 2; 92 Cong. Rec. 5312 (remarks of then-Congressman Henry Jackson); *id.* at 5318 (Congressman Stigler); 5319 (Congressman Rizley, Congressman Case); 5320 (Congressman Stefan).

President Truman stated in signing the Act that it embodied "a national policy built upon fair dealing." *Public Papers of the Presidents of the United States: Harry S. Truman 1946,* p. 414 (G.P.O. 1962).

[22] As of September 1978, the Indian Claims Commission had not disposed of 68 dockets, and 20 dockets had previously been transferred by it to the Court of Claims. United States Indian Claims Commission, *Final Report,* p. 20 (1978).

purpose" of the Act's framers. *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 274 and n. 2 (1955).

The court's holding also conflicts with the language and prior administration of the Act. Section 22, 25 U.S.C. 70u, reprinted in Appendix G, is very clear that a tribe is estopped from asserting a claim only after payment of a claim, not before. This section provides that "payment of any claim***shall be a full discharge of the United States" and "a final determination***made and reported***shall forever bar any further claim or demand against the United States." The converse is likewise true. Where as here payment has not been made, the United States is not discharged. Where as here a report has not been filed, a claim cannot be barred.

The Act has never before been administered to deny a stay requested by an Indian tribe for the purpose of securing executive, congressional or judicial consideration of a well-founded land claim. To the contrary, *in every other case before it,* the Indian Claims Commission granted stays in these circumstances.[23] That policy,

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[23] For example, in November, 1968, the Commission agreed to sever from Docket 47 the Yakima Tribe's claim concerning over 21,000 acres of land around Mt. Adams, and to stay that claim "to enable the Yakima Tribe to seek restoration of those lands to the Yakima Reservation." 20 Ind. Cl. Comm. 76, 91 (1968). This stay lasted until 1972, when the Yakimas were successful in persuading the President to restore their title to the lands in question. *Yakima Tribe v. United States,* 29 Ind. Cl. Comm. 125 (1972). See also 42 ops. Atty Gen'l 441 (1972). In similar fashion, the Commission in 1970 severed the claim of the Taos Pueblo to Blue Lake from the rest of Docket No. 357, and stayed the severed proceeding on the ground that legislation was pending before Congress, *Pueblo of Taos v. United States,* 22 Ind. Cl. Comm. 444 (1970).

A stay of nearly ten years has been issued in Dockets 80-A and 80-B, claims by California Mission Tribes for deprivation of their

[footnote continued]

abandoned by the decision below, vindicates the policy of this critical Act.

4. *The decision conflicts with a holding of the Court of Appeals for the Ninth Circuit in a case involving Western Shoshone.*

The holding that filing a petition and stating that lands have been taken estops Indians from claiming title while the case is pending also directly conflicts with the decision of the Court of Appeals for the Ninth Circuit in *United States v. Dann*, 572 F.2d 222 (C.A. 9, 1978). *Dann* is a trespass action against two Western Shoshone Indians for grazing livestock on "public lands" within the treaty country without a permit from the Bureau of Land Management. The Indians' defense is that the Western Shoshone own beneficial title to the lands. The district court first granted the United States' motion for summary judgment, reasoning in an unreported opinion that the Indians were estopped from asserting title. The court of appeals reversed, and remanded the case "for the purpose of deciding title." 572 F.2d *supra* at 223. The district court recently, on July 3, 1979, heard agrument on the parties' cross motions for summary judgment and took them under advisement.

The court of appeals specifically held in *Dann* that the title question "was neither actually litigated nor actually decided in the proceedings before the ICC. [Indian Claims Commission]." 572 F.2d *supra* at 226. The court concluded that:

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water rights, to permit the Tribes to prosecute suits in federal court asserting that their rights have never been taken. And Docket 181-D has been stayed for over two years while the Colville Tribe negotiates with federal agencies concerning administrative or legislative disposition of their entitlement to compensation.

> "The extinguishment question was not placed in issue in the litigation before the ICC. The title phase of the litigation before the ICC determines whether the Indians ever had aboriginal title before the arrival of the white man, not whether title thereafter had passed to the United States.
>
> * * *
>
> Whatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation before the ICC, the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided." *Id.* at 226-227. (footnote omitted)

The court of appeals' decision in *Dann*—that the Western Shoshone are not estopped by the pendency of the claims proceeding from litigating their title—squarely conflicts with the decision below. Unless this Court grants the Writ to consider which decision is correct, the ultimate resolution of the title question in *Dann* will be stripped of practical prospective effect.[24]

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[24] A final judgment in this case would not moot the *Dann* case. Because the United States is suing for trespass damages, the issue in *Dann* is whether Western Shoshone title was extinguished to those lands in 1974, when the case was filed. A final judgment in this case would only estop Western Shoshone Indians from asserting ownership *after* the date of judgment, which has not yet occurred.

A likely consequence, then, of this Court's failure to grant the Writ and reverse the court below is that *Dann* will ultimately be resolved in favor of Western Shoshone title to the lands, but the Western Shoshone will be estopped by this case from profiting from that determination. That travesty of justice should be prevented.

CONCLUSION

The refusal of the court below, the Commission and the Secretary of the Interior to grant the Western Shoshone an opportunity for a decision on the merits of their claim to lands works gross injustice. It leaves these Indian people with their backs to the wall. They will lose land they have a strong claim to, forever, without a meaningful "day in court," unless this Court acts.

Although this is the most important case in their history, the Western Shoshone understand that this Court is busy with other important cases. They had hoped that lower courts and agencies would permit them to obtain a decision on the merits of their claim. This Petition is now their only hope. The Court should grant the Writ and reverse the court below.

The injustice of the decision below is manifest, the court's analysis clearly a misconstruction of the Indian Claims Commission Act and a misapplication of the election of remedies doctrine. Should this Court not entertain plenary consideration of this case, the Western Shoshone respectfully suggest that it presents an appropriate case for summary reversal and remand with instructions to the court below to stay proceedings and permit the title question to be determined.

Respectfully submitted,

REID PEYTON CHAMBERS
SONOSKY, CHAMBERS,
& SACHSE
2030 M Street, N.W.
Washington, D.C. 20036

August, 1979

APPENDIX

APPENDIX A

In the United States Court of Claims

Appeal No. 1-78
Ind. Cl. Comm. Docket No. 326-K

(Decided February 21, 1979)

THE TEMOAK BAND OF WESTERN SHOSHONE INDIANS, NEVADA, APPELLANT v. THE UNITED STATES AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP REPRESENTED BY THE TEMOAK BANDS OF WESTERN INDIANS, NEVADA, APPELLEES.

Reid Peyton Chambers, attorney of record for appellant. *Sonosky, Chambers & Sachse*, and *Marvin J. Sonosky*, of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General James W. Moorman*, for appellee United States.

Robert W. Barker, attorney of record for appellee Western Shoshone Identifiable Group, etc. *Wilkinson, Cragun & Barker, Jerry C. Straus* and *John M. Facciola*, of counsel.

Before FRIEDMAN, *Chief Judge*, NICHOLS and BENNETT, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

NICHOLS, *Judge*, delivered the opinion of the court:

Both sides appeal from a judgment of the Indian Claims Commission relating to the claim of the Western Shoshones for taking of aboriginal title lands in the present States of California and Nevada. The claimants long prosecuted the claim on the basis that the entire tract was taken on a date to be determined, and because of this the claim of the Indians was money compensation only. In 1974 a group of Shoshones attempted to intervene, asserting that the claimants still own much of the tract. They wanted a stay or suspension to allow their position to be developed and presented. *See Western Shoshone* v. *United States*, 209 Ct. Cl. 43, 531 F.2d 495, *cert. denied*, 429 U.S. 885 (1976). Now new counsel representing the tribe itself, or purporting to do so, make a like contention. Defendant as appellee opposed below and opposes here any such suspension. We hold that far too much water had gone under the bridge even in 1974; we think the Commission effectuated the will of Congress more perfectly by allowing this case to come to final judgment, and we therefore affirm on appeal its decision not to suspend. In defendant's cross-appeal, its contention, which we reject, is that the Commission erred in awarding $4,604,600 as compensation for minerals removed from the tract before the stipulated valuation date of July 1, 1872. The former counsel for the Indians, not the new ones, argued for them this portion of the case. Our analyses of these issues follow, part I discussing the Indians' appeal, and part II the government's appeal.

I

The desire of the Indians to make the water flow back under the bridge is explained as a natural reaction to a visible change in legal climate, where Indian claims to own large tracts are reported in litigation or settled favorably to them, whereas, they say, in 1946 the pursuit of a money award, as made possible by the Indian Claims Commission Act, 25 U.S.C. § 70a and ff, seemed the only hope for

justice. The instant claim is one of many where the Commission was unable to discover any formal extinguishment of Indians' legal title, only gradual encroachment by settlers and others, and takings, the exact date of which could not be definitely set. 11 Ind. Cl. Comm. at 416. The Indians now claim, as not taken, only vacant land, not settled, patented, improved or mined, and no town sites. In *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 358, 393 F.2d 786, 807 (1968), it was suggested by one judge of those participating that as to vacant, unimproved land in the public domain, in Nevada, where Indian title was not formally extinguished, it had not "been taken yet" (*i.e.*, by 1968). There might be a considerable difference between an award for desert land "taken" over a century ago, but not carrying interest, and the selling price of even such desert land today, and counsel say the Indians would be able to use much of the involved land in their present way of life. Much of it is grazing land.

The proceeding was started in 1951. By stipulation filed February 11, 1966, the parties agreed that the "valuation date" for Shoshone Nevada land would be July 1, 1872. Findings as to the extent of the land taken, 22,211,753 acres in Nevada, and 2,184,650 acres in California, had already been made. A trial on valuation took place in September 1967, and following oral argument and briefing, the Commission awarded plaintiffs $21,350,000 for the Nevada land, to which it added $200,000 for California land, and $4,604,600 for removal of minerals from the Nevada land before the taking date. It deducted $9,410.11 as payment on the claim, and nothing for offsets, making a total judgment of $26,145,189.89, as entered. 40 Ind. Cl. Comm. 318, 452 (August 15, 1977).

The attempted intervention was by the Western Shoshone Legal Defense and Education Association and Frank Temoke. It was filed with the Indian Claims Commission April 18, 1974, at which time the extent and value of land and minerals taken had been determined, and only the offsets and payments then awaited adjudication. The intervenors alleged the Western Shoshones still had title to about 12 million acres, and they claimed collusion between

the Temoak Bands and the government to treat the title as extinguished. The Commission, after hearing oral argument, dismissed the intervening petition. 35 Ind. Cl. Comm. 457. This court affirmed in the decision cited above. After holding the intervenor's appeal was not premature and that we therefore had jurisdiction of it, we pointed out how belated the attempted intervention was in light of how much the Commission had done and how little remained to do; that the intervening petitioners themselves alleged they had been aware of the case for 39 years and had repeatedly protested; and that no adequate excuse was offered for the long delay. We said that the longer the delay, the better the reason for intervention that had to be shown. We held that the intervenors could not take control of the case from those then in charge unless they could show fraud, collusion, or laches, none of which was alleged except in conclusory assertions not sufficient to call for a trial. Instead of collusion, there was, we thought, a deliberate unilateral choice to claim compensation as for a "taking" of the involved lands. As regards the fear of the intervenors that they might lose the right to claim title if the case proceeded to final judgment, we pointed out that by Section 22 of the Act, 25 U.S.C. § 70u, the United States would not be discharged of any claim, including one that the Western Shoshones owned the land, until the judgment was reported to Congress, money to pay it appropriated, and payment made. The intervenors might, we said, ask Congress to delay payment.

The Temoak Band had been determined to be entitled to control the litigation on behalf of all Western Shoshone, and the intervenors were deemed by us to be non-Temoaks. Now, however, the Temoak Band itself has ostensibly changed its position. Following our remand, it petitioned the Secretary of the Interior to determine that the Western Shoshone retained ownership of the claimed acres, terminated the contract with Wilkinson, Cragun & Barker (hereinafter called old counsel), who had been in charge of this litigation hitherto, and retained Sonosky, Chambers & Sachse (hereinafter called new counsel). Old counsel have continued to participate so far as concerns the government

cross-appeal. A brief by them is on file in which they also contest the legality of their purported ouster, and say the Indians have not had a chance to vote on it, but by consent of all counsel, this issue was not argued orally. To decide it does not appear necessary for adjudication of the appeals now before us. New counsel moved for a stay of proceedings in the Indian Claims Commission, and the Commission denied the motion the same day it entered its final judgment, August 15, 1977. New counsel appealed the denial order and the judgment on November 11, 1977. It is said the Secretary is awaiting our decision on this appeal before making any move to adjudicate the title claim, but neither we nor the Commission have stayed or, it would appear, have had authority to stay, any adjudication he might engage in as to the title.

We can and do assume that the Temoaks really desire to sweep the water back under the bridge, and that they have employed new counsel to assist them in this endeavor. Any question as to the rights of new and old counsel vis-a-vis one another can wait until the proper time for adjudicating such matters. We can also put aside as irrelevant whether the course now proposed will or will not be more beneficial to the Shoshone, Temoak and others, than the one previously charted.

A different question would arise if the Temoaks desired to abandon this proceeding in its entirety. They do not. They make no claim to the title at present to ten million acres, more or less, which they still concede were taken, and eventually, their compensation to be awarded for that must come to judgment here, if the present one does not stand. Presumably, as to that as well as to the lands they do claim, if they work their will, the proceeding here must simply wait. After they have carved out whatever part they successfully claim to own, the award for the rest must be redetermined. That could be a simple matter if the parties were willing to use the record already made and the findings of the Commission. That matter does not rest in the discretion of the Temoaks alone. They cannot change their litigation position so drastically and not allow their adversary a like privilege. Defendant, also, now repents

many of the stances it has taken in the conduct of this litigation. Most likely it would not now agree to the valuation date it once stipulated. With a different valuation date, the expert appraisals would be out of court and new ones would be necessary. This lawsuit has already lasted since 1951, for reasons peculiar to this type of litigation, which no one criticizes, and it appears the Temoaks contemplate cheerfully another quarter century of litigation. The Commission's position was:

> * * * [W]e are of the opinion that it is too late in the litigation for the Commission to be asked to stay proceedings in order to permit the adjudication of the case on a new theory, and this would be our position had the request come from the attorney of record for the plaintiff [old counsel] since the law of the case has long been established. 40 Ind. Cl. Comm. 305, 308–09.

The parties have embellished this stark proposition with citations as to the law of the case prevailing over the policy of new counsel, etc. We prefer to adopt it as our own without such embellishment, and hereby do. At the very least that can be said for it, it does not reveal an abuse of discretion.

We think that when the defendant announces by statute or regulation a procedure for presenting and deciding claims against it of some particular kind, and when a claimant files a petition in the manner and form prescribed, that is the procedure to be followed. The implied obligation of the claimant is to state his claim and stick to his statement, and to prosecute his claim diligently to adjudication, so that it can be paid and the government relieved of the threat of it as a thunder cloud in the sky. The correlative obligation of the defendant is to accord due process, to make its defense diligently though fairly, and to pay whatever award the required procedure produces. The diligent prosecution of a claim implies the dealing with it on a straight forward basis. The abandonment of an entire claim at any point with prejudice may well be a claimant's right, but the partial and contingent abandonment of it, after 25 years, without prejudice, when the goal of final

adjudication is in sight cannot be. That is in essence what the Indians would do here.

Plaintiff says defendant is not harmed by the proposed partial and contingent abandonment, because the award does not bear interest, but defendant is the best judge of its own welfare and it is here urging us to affirm the Commission. The Temoaks were under a duty to defendant to discover and announce their claim to own the 12 million acres adjudged to have been taken, perhaps not before they filed the petition, but surely before 1976. There can be no doubt that Congress passed the Indian Claims Commission Act, 25 U.S.C. § 70 and ff, with the object of drawing in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all. It may have even been so optimistic as to hope to have this accomplished in the lifetimes of persons then living. It provided in Section 22 that payment of a claim as assessed under the Act would discharge not only the specific claim made, but all claims and demands touching any of the matters involved in the controversy. The object was not pecuniary, in the short-term sense, so the saving or incurring of interest is not the major matter. Congress had long-term political objects, in the non-pejorative sense of the word "political," that are frustrated by continued delay in adjudication of claims.

Moreover, there is a third party to the controversy, whose interests litigants often neglect, the tribunal itself, the Indian Claims Commission at the time of the order appealed from, now ourselves as its successor. As Chief Justice Burger has said:

> We can no longer indulge in the old notion that it is "up to the lawyers to push cases." *Once a case is filed it is public business as well as private.* It is up to judges to see to it that dilatory tactics by neither party can frustrate speedy justice. [Emphasis supplied.] [Press Release by Supreme Court Public Information Office, December 21, 1978.]

We think, if this case had been sidetracked in the manner proposed, it would have been contrary to the statutory procedure under which the suit was brought, the intent and purpose of the Act, and the duty of the federal

judicial system to employ its resources economically as well as to achieve the ends of justice speedily. If the Indians desire to avert the extinguishment of their land claims by final payment, they should go to Congress as recommended in *Western Shoshone*, 209 Ct. Cl. at 59, n. 16, 531 F.2d at 503. If Congress wishes to alter or undo the normal course of Indian Claims Commission adjudication, it knows how to do it. *Cf.* Act of March 13, 1978, Pub. L. No. 95–243, 92 Stat. 153. The matter is somewhat changed since the *Western Shoshone* footnote because Congress can no longer stop the payment and defer the extinguishment of the title claim, just by not appropriating. By recent enactments, Act of March 7, 1978, Pub. L. No. 95–240, 92 Stat. 107, 116 and Act of May 4, 1977, Pub. L. No. 95–26, 91 Stat. 61, 96, Congress has amended the old standing appropriation to pay Court of Claims judgments, 31 U.S.C. § 724a, to make it available for Indian Claims Commission judgments, and to remove the old $100,000 limitation, there being now no upper limit on the amount of the judgment that can be paid. Thus it looks as if the Temoaks would have to get Congress to act affirmatively. In view of its plenary power over Indian tribal property, as spelled out in *Turtle Mountin Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 444, 490 F.2d 935, 945 (1974), we have no doubt that even after payment its action could be effective. And we think it is only Congress that could stay and undo the course of litigation at this late date, and if anybody should, it is only Congress. The essential point of the matter is that the Temoak's true appeal is to legislative grace, not as of right to this court. We do not mean to intimate a view whether or not new legislation should be enacted.

II

The cross-appeal is against the award by the Indian Claims Commission of $4,604,600 for removal of minerals from the Nevada portion of plaintiff's aboriginal lands before July 1, 1872, the stipulated valuation date. The Commission found it could not definitely set the valuation date, whereupon the parties stipulated that as to the

Nevada portion it was July 1, 1872. The Commission awarded $21,550,000 as the fair market value on the valuation date, of which $200,000 was for the California portion and the rest for the Nevada portion, not in contention in this appeal. The $4,604,600 was in addition, and supposedly the minerals removed, being no longer in place on the valuation date, did not constitute part of the then value.

The Commission considered that its decision was controlled by *United States* v. *Goshute Tribe*, 206 Ct. Cl. 401, 512 F.2d 1398 (1975). As defendant says, that is the only case where this court has sustained an award for removal of minerals before a found taking date. The facts of that case and this are indistinguishable. By almost identical and contemporaneous treaty provisions, there the Goshutes, Treaty of Tuilla Valley, 13 Stat. 681, here the Western Shoshone, Treaty of Ruby Valley, 18 Stat. 689, both in 1863, agreed with the same commissioners that the countries of the respective tribes might be explored and prospected for gold and silver, or other minerals, that mines when discovered might be worked, mining and agricultural settlements formed, and ranches established; that mills might be erected and timber taken for their use, as also for building. In recognition of the inconvenience to be anticipated to the respective tribes, including loss of game, the United States agreed to pay the Goshutes $1,000 per annum for twenty years, the Western Shoshone $5,000 per annum in such articles, including cattle, as the President might determine. Defendant does not distinguish the cases by the small differences in the treaty provisions.

In both instances, large amounts of valuable ores were mined and removed between the treaty dates and the found or agreed dates of valuation, or in other words, of full title extinguishment. In *Goshute*, we took the view, as the Commission did, that the tender of such a one-sided treaty for adhesion, in 1863, to ignorant and unlettered Indians, was unfair and dishonorable, generating a right to recovery under clause 5 of section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a, "claims based upon fair and honorable dealings that are not recognized by any existing

rule of law or equity." The Commission found, then and here, that a royalty of 20 percent of the value of the minerals removed up to the taking date, less the consideration paid, would be fair compensation. We agreed then, as we do here, that a valid claim under "fair and honorable dealings" was presented and the mode of rectifying it was proper. In this connection, we may further observe that law and equity, before 1946, did not afford a judicial remedy for the overreaching of an Indian tribe by an unfair treaty such as we have here. *United States* v. *Choctaw and Chickasaw Nations*, 179 U.S. 494 (1900). It was considered a "political" matter, entirely in the hands of the "political" i.e., the executive and legislative, authorities.

We further took the view that the treaty language did not confer on the United States or the miners any ownership of the minerals in the ground, only a license to remove whatever they did remove. So here also.

The taking award in both cases is founded on clause 4 of section 2, "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant * * *." The right to recover a 20 percent royalty under clause 5 is deemed terminated as of the taking date, and instead the minerals remaining in the ground are considered and valued as part of the entire fee. Such is the Commission's theory of both cases approved and adopted by us in our *Goshute* decision. We note that the value of the minerals in the ground on the taking date was found to be $12,500,000, while townsites were $900,000, farming land $1,500,000, good grazing land $3,750,000, fair to poor grazing land $2,700,000, all for the Nevada portion, making the total award for that portion $21,350,000, as stated above. Thus minerals were the predominant element.

Defendant makes much of the alleged distinction that in *Goshute* the Commission found the taking date, January 1, 1875, whereas here it was a matter of stipulation that the "valuation date" should be July 1, 1872. 29 Ind. Cl. Comm.

5, 7. Defendant says there was no stipulation as to the taking date.

Despite the similarity of the *Goshute* facts, defendant wants to make the controlling precedent here not *Goshute*, but *United States* v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 490 F.2d 954 (1974). In that case there was no treaty, no "fair and honorable dealing" claim based on an unfair treaty. We held that the Northern Paiutes, having previously been awarded a substantial sum for the value of their aboriginal Nevada lands on an average or composite taking date, December 31, 1862, could not also recover "trespass damages" for failure of the United States to protect the tribal lands from ravages by miners before that date. The explanation was in part a serious doubt whether the United States was not being compelled to pay for the same thing twice. In the earlier case, 183 Ct. Cl. 321, 393 F.2d 786 (1968), the damage done by the miners before the taking date, and the value added by their improvements, had both alike been ignored, in a sort of washout. The value assigned to the mineral property on the taking date was based on speculative purchases and sales of mineral property, and there was nothing to show it was abated a single dollar because of prior removal of minerals. On the technical side, we took the view that the United States having ratified and confirmed the miners' acts, they became acts of the United States, and takings. The found taking date having been an average or composite one, nothing having been found to have happened on the chosen date, it was not inconsistent with an earlier taking date for the mining claims actually staked before December 31, 1862. In fact, in stipulating use of that date for valuation, the parties expressly reserved the right to question any order the Commission might issue concerning taking dates. Thus our view was that the prior proceeding had adjudicated the liability of the United States for all takings, including those by miners which it had ratified and adopted. We left open the possible further liability for "trespass damages" in case of any ravages by miners not so ratified and adopted by the government, but we have not been informed whether that possibility was pursued.

The theory of the second *Northern Paiute* case thus was that against that tribe there was only one wrong, a taking, though one spread out in time, compensable under only one clause of the Act, clause 4, section 2, and that the attempt by the Commission to generate out of it two proceedings and two awards, was error. In *Goshute*, on the contrary, there were two wrongs, the unfair treaty of 1863 and the taking of 1875. They were compensable under two different clauses, 5 and 4, and compensation was assessed separately but simultaneously in one proceeding, a prudent joinder which gave good assurance against double compensation for the same thing. In both cases we rejected the Commission's "trespass damages" theory. The view put forward in *Northern Paiute* of imputing the miners' staking of claims to the United States, making the United States a taker pro tanto, could not apply in *Goshute*. As we then pointed out, the miners entered under the license the Indians had granted in the 1863 treaty, and not adversely to the Indians, and, therefore, their entries effected no takings. Conversely, as we also held, they acquired no title to minerals in the ground, and thus their entries could in no way have anticipated or forestalled the 1875 taking stipulated as the valuation date. That the 1875 date in *Goshute* was just as much a composite, average, or jury verdict date as the one in *Northern Paiute* is obvious, but the point was that the composite could not have included, as one of its elements, takings by miners, imputed to defendant. In *Goshute*, the Indians received royalties for pre-taking removal of minerals by way of reformation of an unfair treaty, but in *Northern Paiute*, no such view of the matter was possible.

The question of supplemental "trespass damages" came up again in *United States* v. *Fort Sill Apache Tribe*, 209 Ct. Cl. 433, 533 F.2d 531 (1976). In that case there was likewise no previous unfair treaty, so the *Goshute* rationale did not apply. The findings of the Commission were such as to rule out the theory of imputing to the United States takings by miners in staking their claims. We held there was no theoretical obstacle to holding the United States liable, under clause 5, for dishonorable failure to bar trespassers

from extracting minerals, but in such a case the United States should receive credit for whatever the trespassers did that enhanced the value of the land before the taking, and thus the taking award itself. The "trespass damages" a divided court held should net the value-destructive and value-enhancing activities of the trespassers' activities in their totality. Fair and honorable dealings required no more.

It will be obvious, we think, that whether a magic date is called a taking date or valuation date, and whether it is found by the Commission or stipulated is irrelevant in deciding whether to follow *Goshute*. What sets *Goshute* apart is that there are two kinds of wrongs, not one, with entirely different impacts on the fortunes of the Indians, and compensable under different clauses of the Act.

As we indicated in *Goshute*, 206 Ct. Cl. at 411, 512 F.2d at 1403, the absence of any allowance of credit to the United States for whatever it or the miners might have done to enhance the taking date value, before the taking, was troublesome. We noted, however, the nonuse in the award of speculative values that the miners might have created, the absence of any contention by defendant that the taking award was enhanced by such causes, and the predominance of actual or estimated quantities of minerals in both the pre-taking and taking portions. We cannot insist on perfect awards. The case would be different if defendant had made offers of proof before the Commission to show that the miners' presence and activities in the area, or those of others, made possible by the treaty, did enhance the value and affect the amounts awardable for the taking. As things are, we can only guess that such an effect occurred. On the other hand, the Commission might have held that in correcting an unfair treaty it should consider what was known on the treaty date, to make a corrected treaty that fair-minded treaty commissioners and knowledgeable Indians would have thought proper then. It might be thought unlikely that such negotiators would have speculated about future rises in land value and future takings. In this regard, the *Goshute* case, with an unfair treaty to correct, is also distinguishable from *Northern*

Paiute and *Fort Sill Apache*, where there was none. The 20 percent royalty, unadjusted, as proposed by the Commission in all three cases, clearly has a better theoretical foundation in the unfair treaty case.

At any rate, though we think *Goshute* was rightly decided, whether right or wrong it is an all-fours precedent here that could be overruled only by the full court en banc. The case cannot be distinguished from *Goshute* in any feature that is relevant.

Accordingly, the plaintiff's appeal is overruled, the defendant's cross-appeal is overruled, and the judgment of the Commission is

Affirmed.

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

Appeal No. 1-78

[Filed: June 1, 1979]

THE TEMOAK BAND OF WESTERN SHOSHONE INDIANS, NEVADA,

Appellant,

v.

THE UNITED STATES AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP REPRESENTED BY THE TEMOAK BANDS OF WESTERN INDIANS, NEVADA,

Appellees.

Reid Peyton Chambers, attorney of record for appellant. *Sonosky, Chambers & Sachse*, and *Marvin J. Sonosky*, of counsel.

Donald Milure, with whom was *Assistant Attorney General James W. Moorman*, for appellee United States.

Before FRIEDMAN, *Chief Judge*, NICHOLS and BENNETT, *Judges.*

ORDER

This case comes before the court on its own motion for further consideration and action on appellant's motion for rehearing with reference to the order entered herein on April 3, 1979, which, among other things, provided for completion of the court's action on the said motion for rehearing on or about May 15, 1979. Upon consideration thereof, without oral argument, the period of extended stay to May 15, 1979, having expired with no further supplemental stipulation, motions, briefs or filings by the parties,

IT IS ORDERED that appellant's said motion for rehearing, filed March 7, 1979, be and the same is denied.

BY THE COURT

/s/ Daniel M. Friedman
Chief Judge

APPENDIX C

40 Ind. Cl. Comm. 318 453

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-K

THE WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FINAL AWARD

UPON CONSIDERATION of the findings and opinion entered herein today which are incorporated and made a part hereof, and of the entire record in this case, the Commission concludes as a matter of law that the plaintiffs are entitled to recover from the defendant for and on behalf of the Western Shoshone Identifiable Group the sum of $26,145,189.89.

IT IS HEREBY ORDERED that as a final award in full satisfaction of all claims against the defendant in Docket 326-K, the plaintiffs have and recover from the defendant for and on behalf of the Western Shoshone Identifiable Group the sum of $26,145,189.89.

Dated at Washington, D.C., this 15th day of August 1977.

/s/ Jerome K. Kuykendall, Chairman

/s/ John T. Vance, Commissioner

/s/ Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce, Commissioner

/s/ Brantley Blue, Commissioner

APPENDIX D

40 Ind. Cl. Comm. 305

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-K

THE WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING MOTIONS TO STAY PROCEEDINGS FOR OTHER PURPOSES

On November 15, 1976, and January 24, 1977, the Chairman of the Business Council of the Temoak Bands of Western Shoshone Indians filed motions to stay proceedings in Docket 326-K pursuant to resolutions of the Business Council of the Temoak Bands. On April 7, 1977, the Temoak Bands filed an amended motion for a stay of proceedings and supporting material through an attorney employed by their Business Council under a special contract of March 9, 1977, to represent the Temoak Bands before this Comission. The Temoak Bands, in their motions to stay proceedings,

reject the litigation plan followed by the plaintiff from the time the claim was filed. They request a stay pending an adminstrative determination by the Secretary of the Interior on their petition filed with the Secretary on February 22, 1977, asserting that the Western Shoshone Indians of Nevada own beneficial title to some or all of the lands described in Article V of the Treaty of October 1, 1863, of Ruby Valley, 18 Stat. 869.

The defendant responded on November 23, 1976, January 14, and 31, February 23, and April 19, 1977, opposing the motions to stay on the ground that the Commission has already ruled against assertions that the plaintiff owns the Indian title to the lands under consideration. On April 19, 1977, the defendant also filed a motion for an order dissmissing all of the plaintiff's claims before the Commission in subject docket if the Commission grants a stay of proceedings herein.

On November 29, 1979, the plaintiff's attorney of record moved that the Commission enter its findings on offsets and stay entry of final judgment until disposition of the motion to stay proceedings. In a response of December 8, 1976, the defendant opposed the request for stay of entry of final judgment. On February 28, 1977, the plaintiff's attorney of record replied to the first two motions to stay filed by the Temoak Bands and on April 19, 1977, replied to the amended motion to stay, requesting, by cross-motions, that the Commission issue its findings and conclusions on the offsets phase of this case and that the Commission request the Secretary of the Interior to assist in holding meetings of the Western Shoshones for the purpose of deciding on a course of action in this litigation. On April 28, 1977, the plaintiff's attorney of record filed a response in opposition to the defendant's motion to dismiss.

On April 27, 1977, the defendant responded to the cross-motions of the attorney of record for the plaintiff; on May 2, 1977, the Temoak Bands responded, opposing the defendant's motion to dismiss, and replied to the responses of the defendant and to that of the attorney of record for the plaintiff to the amended motion for a stay. The response of May 2 also replied to the cross-motions of the plaintiff's attorney of record. On May 12, 1977, the attorney of record for the plaintiff responded to the Temoak Bands' reply to the cross-motions.

Oral argument on the above listed motions, responses, and supporting pleadings was held before the Commission on July 18, 1977.

Upon consideration of the foregoing pleadings, the supporting documents, and oral argument thereon, and being fully advised in the premises, the Commission concludes that:

(1) The Temoak Bands, organized under the Indian reorganization Act, 25 U.S.C. §461, and recognized by the Secretary of the Interior as having authority to maintain a suit, were held to have the capacity to maintain the Docket 326-K suit. *Shoshone Tribe of Indians v. United States,* 11 Ind. Cl. Comm. 387, 418 (1962). The Western Shoshone Identifiable Group, plaintiff herein, is made up of persons from at least four separate reservations, from a colony, and from non-reservation groups. The plaintiff has been represented before the Commission, since the filing of the Docket 326-K claim in 1951, by the Temoak Bands of Western Shoshones. The Temoak Bands claim authority, as exclusive representative of the plaintiff, under an irrevocable power of attorney, to request a stay in these proceedings in attempting to obtain part of the land included in the subject claim rather than money

compensation therefor. In filing the motions to stay, the Business Council of the Temoak Bands has reversed its former position of pursuing the claim herein under the Indian Claims Commission Act for money compensation and, by requesting the stay, has adopted the position of the Western Shoshone Legal Defense and Education Association. The requests by that Association for a stay of proceedings and to present an amended claim herein were denied by the Commission, which denial was affirmed by the Court of Claims. 35 Ind. Cl. Comm. 457 (1975), *aff'd, Western Shoshone Legal Defense and Education Association v. United States,* 209 Ct. Cl. 43 (1976), *cert. denied* 429 U.S. 885 (1976).

(2) Two tribes, the Yomba Shoshones and the Duckwater Shoshones, with members belonging to the plaintiff Identifiable Group challenge the assertion that the Temoak Bands are the exclusive representative of the plaintiff. The Court of Claims has held that the exclusive right of representation granted in Section 10 of the Indian Claims Commission Act for tribal organizations recognized by the Secretary of the Interior extends only to representation of its own members (*Turtle Mountain Band of Chippewa Indians v. United States,* 203 Ct. Cl. 426, 454-459 (1974); *cf. Western Shoshone Legal Defense and Education Association, supra,* at 60-61 and note 18 on this point.)

(3) Assuming, without deciding, that the Temoak Bands are the exclusive representatives of the Western Bands of the Shoshone Tribe of Indians under an irrevocable power of attorney, we are of the opinion that it is too late in the litigation of the Commission to be asked stay proceedings in order to permit adjudication of the case on a new theory, and this would be our position had the request come from the attorney of record for the

plaintiff, since the law of the case has long been established. *Western Shoshone Legal Defense and Education Association, supra.*

(4) The cross-motion of the attorney of record for the plaintiff that the Commisision enter its findings and conclusions on offsets and his motion that the Commission stay entry of final judgment until disposition of the motion to stay proceedings will be dismissed as the Commission's action on offsets in subject docket and on the motions to stay proceedings is being taken today. The cross-motion of the plaintiff's attorney of record that the Commission request the Secretary of the Interior to assist in arranging meetings of the Western Shoshones for the purpose of deciding on a course of action in this litigation will be denied as inapposite in view of our conclusion that the motions to stay should be denied.

(5) The defendant's motion that the Commission dismiss all the claims of the Western Shoshone Identifiable Group in Docket 326-K in the event that the Commission does not deny the Temoak Bands' motions to stay will be dismissed since the Commission concludes that the motions to stay should be denied.

IT IS HEREBY ORDERED that the motions of November 15, 1976, and January 24, 1977, and the amended motion of April 7, 1977, by the Temoak Bands of Western Shoshone Indians of Nevada for a stay of proceedings in Docket 326-K be denied. IT IS FURTHER ORDERED that the cross-motion of the plaintiff's attorney of record as to the Commission's findings and conclusions on offsets be dismissed, that his motion to stay entry of final judgment be dismissed, and that the cross-motion regarding a request that the Secretary of the Interior assist in arranging meetings of the Western Shoshones in order to decide action to be taken in

this litigation be denied. IT IS ORDERED ALSO that the defendant's motion that the Commission dismiss the plaintiff's claims in this docket if the motions to stay by the Temoak Bands are not denied is dismissed.

Dated at Washington, D.C. this *15th* day of August 1977.

/s/ Jerome K. Kuykendall, Chairman

/s/ John T. Vance, Commissioner

/s/ Richard W. Yarborough, Commissioner

/s/ Margret H. Pierce, Commissioner

/s/ Brantley Blue, Commissioner

APPENDIX E

11 Ind. Cl. Comm. 387 34/

BEFORE THE INDIAN CLAIMS COMMISSION

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION, WYOMING, *et al.*, *Petitioners,* *v.* THE UNITED STATES OF AMERICA, *Defendant.*	Docket No. 326
SHOSHONE NATION OR TRIBE OF INDIANS on the relation of and represented by EDWARD QUEEP BOYER, *et al.*, *Petitioner,* *v.* THE UNITED STATES OF AMERICA, *Defendant.*	Docket No. 367

Decided: October 16, 1962

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Petitioners in Docket No. 326 are the Shoshone Tribe of Indians of the Wind River Reservation, Wyoming, suing as representatives of the Eastern Bands of Sho-

shonee Indians; the Northwestern Bands of Shoshone Indians; the Shoshone-Bannock Tribes of Fort Hall Reservation, Idaho, suing on behalf of the Northwestern Bands of Shoshonee and on behalf of the Mixed Bands of Bannacks and Shoshonee Indians and on behalf of the Bannack Tribe; Te-moak Band of Western Shoshone Indians, Nevada, suing on behalf of the Western Bands of the Shoshonee Nation of Indians; Confederated Tribes of the Goshute Reservation, suing on behalf of the Shoshonee-Goship Bands of Indians, and Little-Moon, an individual member of the Shoshonee-Goship Bands, suing on behalf of and on relation of the Shoshonee-Goship Bands of Indians. Each of these groups sues also on behalf of the Shoshone Nation or Tribe of Indians. All of the petitioners, with the exception of the Shoshone Indians of the Wind River Reservation, Wyoming, and Northwestern Bands of Shoshone Indians and the individual petitioner, Little-Moon, are organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and are recognized by the Secretary of the Interior as having authority to maintain a suit. Petitioner, Shoshone Indians of the Wind River Reservation, Wyoming, is, however, an organization, which although not under the Indian Reorganization Act, recognized by the Secretary of the Interior as having authority to maintain this suit. Petitioners in Docket No. 367 are the Shoshone Nation or Tribe of Indians, on relation of and represented by three named individuals said to be members of the Shoshone Nation or Tribe of Indians. The so-called Shoshone Nation or Tribe of Indians maintains no organization. The organized tribes or groups above-mentiond have the capacity to maintain this suit.

* * *

23. The Commission finds, based upon the findings of fact herein made and the record as a whole, that the Western Shoshone identifiable group aboriginally exclusively used and occupied the following territory:

> Commencing at Brown, California, thence north to the northernmost point of the Upper Haiwee Reservoir; thence in a northeastwardly direction to a point about four miles east of the town of Keeler, California; thence north to the crest of the Inyo Mountains and continuing northerly along the crest of said Inyo Mountains to a point at 36° 50′ N latitude, 118° 00′ W longitude; thence northeastwardly to a point on the California-Nevada State line due south of Lida, Nevada; thence north to the town of Lida, Nevada; thence westwardly to the crest of the Silver Peak mountains and continuing along said crest northwestwardly to a point at 37° 45′ N latitude, 117° 50′ W longitude (due west of Silverpeak); thence north to the crest of the Shoshone Mountains and continuing along said crest to North Shoshone Peak; thence north to Antler Peak on Battle Mountain, thence northeastward to Mountain City, Nevada; thence southeastwardly to the crest of the Pequod Mountains and continuing along said crest to Spruce Mountain; thence to the crest of the Cherry Creek Mountains and then south along said crest to the Egan Range; thence south along the crest of the Egan Range to a point just west of the town of Kimberly, Nevada; thence west to the crest of the White Pine Mountains in the vicinity of Mount Hamilton; thence south along the crest of the White Pine Mountains to Duckwater Mountain; thence south to Troy Peak; thence southwest along the crest of the Quinn Canyon Range to 37° 45′ N latitude and 116° W longitude; thence south to 37° 15′ N latitude and 116° W longitude; thence south to the town of Carrara, Nevada; thence southwest to

Maturanga Peak (southeast of Darwin, California); thence south along the crest of the Argus Range to Argus Peak; thence west to the place of beginning at Brown, California.

* * *

26. The Commission further finds that the Goshute Tribe and the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Findings 22 and 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. For these reasons the Commission may not now definitely set the date of acquisition of these lands by the United States. The Commission, however, finds that the United States, without payment of compensation, acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long prior to this action to be hereinafter determined upon further proof unless the parties may agree upon a date.

APPENDIX F

TREATY WITH THE WESTERN SHOSHONI, 1863.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A.D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and

the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established

whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Sho-shonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and

mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.
Mo-ho-a.
Kirk-weedgwa, his x mark.
To-nag, his x mark.
To-so-wee-so-op, his x mark.
Sow-er-e-gah, his x mark.
Po-on-go-sah, his x mark.
Par-a-woat-ze, his x mark.
Ga-ha-dier, his x mark.
Ko-ro-kout-ze, his x mark.
Pon-ge-mah, his x mark.
Buck, his x mark.

Witnesses:

J. B. Moore, lieutenant-colonel Third Infantry California Volunteers.
Jacob T. Lockhart, Indian agent Nevada Territory.
Henry Butterfield, interpreter.

APPENDIX G

The Act of August 13, 1946, ch. 959, Section 22, 60 Stat. 1055, 25 U.S.C. 70u, reads in full:

§ 70u. Effect of final determination of Commission

(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act [25 USCS §§ 70 and notes-70n, 70o-70v-1], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act [25 USCS §§ 70 and notes-70n, 70o-70v-1] shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

APPENDIX H

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 30, 1979

Reid P. Chambers, Esquire
Sonosky, Chambers & Sachse
2030 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Chambers:

Thank you for your letter of November 16, 1978, concerning the Western Shoshone petition.

As you know, our Office has reviewed this problem in great detail, as has the Assistant Secretary for Indian Affairs. I have concluded that this problem may best be addressed as a policy question—determining and meeting the needs of the Western Shoshone for land—rather than strictly as a legal issue.

After our extensive review of this matter, Assistant Secretary for Indian Affairs Gerard and I have recommended that the Secretary establish a Departmental task force to investigate the conditions of the Western Shoshone in Nevada. If it appears from the investigation that the creation of reservations is needed, the task force will undertake to identify lands which would be suitable for that purpose.

The task force will include participation by this Office and will fully involve the Western Shoshone. Throughout the course of our investigation, we will also consult

closely with the congressional delegation from Nevada. I expect that this action will contribute to a speedy resolution of the issues presented in the Western Shoshone petition and may also be a means by which pending litigation may be resolved.

Sincerely,

/s/ Leo Krulitz
Solicitor

APPENDIX I

IN THE
UNITED STATES COURT OF CLAIMS

App. No. 1-78

[April 3, 1979]

THE TEMOAK BAND OF WESTERN SHOSHONE INDIANS, NEVADA,

Appellant,

v.

THE UNITED STATES AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP REPRESENTED BY THE TEMOAK BANDS OF WESTERN INDIANS, NEVADA,

Appellees.

PRACTICE AND PROCEDURES: WITHDRAWAL OF CASES FROM SUBMISSION; PAYMENT; TIME OF.

Reid Peyton Chambers, attorney of record for appellant. *Sonosky, Chambers & Sachse,* and *Marvin J. Sonosky,* of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General James W. Moorman,* for appellee United States.

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*No brief was filed by counsel for the Temoak Band of Western Shoshone Indians, Nevada, with regard to the motion for rehearing.

Before FRIEDMAN, *Chief Judge*, NICHOLS and BENNETT, *Judges*.

ORDER

This case is before the court on the appellant's motion for rehearing. The court, on the joint request of both parties, grants a stay of proceedings until May 15, 1979, subject to conditions. Action on appellant's other and further requests is deferred until May 15, 1979. The practical effect of this order is that the clerk will not certify our judgment to the Treasury until after the stay expires, and consequently, whatever effect "payment" has in extinguishing Indian title to land will until then not occur. See Part I of our opinion of February 21, 1979, final paragraph.

We heard oral argument on the appeals of both parties on November 28, 1978. Thereafter, the case was in the hands of the court, under submission. At that time appellee United States was strongly opposed to further delay, and no suggestion was offered that any stay for settlement negotiations was desired, at least, none by defendant. On December 4, 1978, the court met in its so-called assignment conference, a decision was tentatively agreed upon, and the writing of an opinion assigned. The opinion was written and circulated, and voted approval at a decisions conference of January 29, 1979. The court secretary thereupon sent it to the printer. On February 15, 1979, the slip opinion was back from the printer and being held for the regular monthly announcement date. Up to that date nothing had been heard of any change in the United State's position and the opinion as issued February 21 necessarily reflected what the court knew of appellee's position up to January

29. Appellant's attack on our opinion for misstating appellee's position comes with bad grace in such circumstances. Of course, we also know appellant and appellee had had twenty-eight years, more or less, to discuss settlement.

The joint motion filed February 15, 1979, apparently was intended and understood by the parties to withdraw the case at least temporarily from submission to the court. We must strongly reject the alleged right of parties to withdraw cases from submission for settlement negotiations, except in extraordinary circumstances not here present. When parties join in submitting a case, whatever else they differ on, they agree that the next order of business is for the court to make its decision; and the sooner it makes it, the better. Settlement can come earlier or later. Any interruption of this process makes a mockery of the orderly and expeditious conduct of court business. The motion of February 15, 1979, was denied for good and sufficient grounds.

Now the court has stated its decision and it is subject to the usual right of the parties to move for rehearing or to apply to the Supreme Court for certiorari. Appellant has moved for rehearing, and both parties have again requested a stay. As a matter of fact, even without a stay, the clerk could not forward the judgment certificate to the Treasury while the motion for rehearing was pending unacted on, and the legal effect, whatever it may be, of payment, could not occur.

The parties are granted a stay of further proceedings until May 15, 1979, but in light of the apparent nonuse of settlement negotiation opportunities over the last twenty-eight years, it is on strict conditions to assure that there will be no further delay. The stay will not be extended after May 15, 1979, and the present judgment

of the court will not be modified pursuant to any agreement or stipulation which requires any further fact finding by this court or which affects the rights of third parties. Possibly a simple stipulation to reduce the amount of land affected by the judgment and the dollar amount of the award, would be feasible. We agree with appellant that this stay is its last clear chance to undo by agreement, in whole or in part, its former moves to exchange lands for money by asserting appellee had taken the lands, and we continue to believe appellant's new expectations can best now be dealt with by congressional action, especially if they raise such complex issues as we fear. Any further stay after May 15 would mock the congressional expectation or hope as it was in 1946, that Indian Claims Commission proceedings would some day finally adjudicate claims based on ancient wrongs against Indians. On or about May 15, 1979, the court will complete its action on appellant's motion for a rehearing and terminate its responsibility concerning the instant claim.

IT IS SO ORDERED.

BY THE COURT

/s/ Daniel M. Friedman
Chief Judge

April 3, 1979

APPENDIX J

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

June 27, 1979

Reid Peyton Chambers, Esquire
Sonosky, Chambers & Sachse
2030 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Chambers:

We have reviewed the February 22, 1977, petition and December 7, 1977, supplementary memorandum of the Western Shoshone concerning restoration of lands within their aboriginal territory in Nevada. The prospect of administrative alternatives which could be used not only to evaluate the Shoshone claim, but also to settle pending litigation with the United States involving the same lands, led us to recommend that the Justice Department seek a stay of proceedings in the Court of Claims. The court granted a stay until May 15, 1979, and in the interim we completed our review of the matter.

We have decided not to undertake a program for establishing additional reservation lands at this time, and will not take any further initiatives to settle the litigation. At this stage in the claims case, it appears not to be in the best interest of the Western Shoshone to delay its conclusion any longer.

Sincerely,

/s/ Cecil D. Andrus
Secretary